IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 24

JOSEPH WALLER, JR.,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court of Appeal of Florida, Second District is reported at 213 So. 2d 623 (2d DCA, Fla. 1968) (App. 52a). The order of the same court denying rehearing is noted at 213 So. 2d 623 (App. 56a). The order of the Supreme Court of Florida, denying certiorari for lack of jurisdiction, is reported in memorandum form at 221 So. 2d 749 (Fla. 1968) (App. 58a).

Jurisdiction

The judgment of the District Court of Appeal of Florida, Second District was rendered and entered on August 28, 1968 (App. 52a). Rehearing was denied on September 17, 1968 (App. 56a). The petition for a writ of certiorari was filed in this Court on December 16, 1968 and was granted on June 23, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

The Fourteenth Amendment to the Constitution of the United States provides, in part:

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 12 of the Declaration of Rights of the Constitution of the State of Florida (1885) provides, in part:

"Section 12. Double jeopardy; self-incrimination; eminent domain; right to work.—No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; . . ."

(*Note*: Substantially the same language appears in the 1968 revision of the Florida Constitution, Article I, Section 9.)

Florida Statutes (1967), Section 811.021 provides, in part:

"811.021 Larceny defined; penalties; sufficiency of indictment, information or warrant.—

(1) A person who, with intent to deprive or defraud the true owner of his property or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person:

(a) Takes from the possession of the true owner, or of any other person; or obtains from such person possession by color or aid of fraudulent or false representations or pretense, or of any false token or writing; or obtains the signature of any person to a written instrument, the false making whereof would be punishable as forgery; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, goods and chattels, thing in action, evidence of debt, contract, or property, or article of value of any kind; . . .

(c) . . . steals such property, and is guilty of larceny.

(2) If the property stolen is of the value of one hundred dollars or more, the offender shall be deemed guilty of grand larceny, and upon conviction thereof shall be punished by imprisonment in the state penitentiary not exceeding 5 years, or in the county jail not exceeding 12 months, or by fine not exceeding $1,000.00."

Section 25.14 of the City of St. Petersburg, Florida, Code (1963) provides:

"25.14 Destroying, etc. of public property.

It shall be unlawful for any person maliciously or wilfully to destroy, mutilate, injure or deface any of

the public buildings, grounds, signs, sidewalks, electric lights, electric light poles or other property of the city.

It shall be unlawful for any officer or employee of any municipal department, or any other person, to destroy, injure, remove or disturb any bench, mark or monument in any street or public place in the city without first procuring a permit from the city manager. (Code 1955, ch. 25, sec. 12.)

[As to malicious injury to buildings and structures, see Florida Statutes, 1961, secs. 822.01 to 822.23. For state law as to trespass and injuring real property, see Florida Statutes, 1961, secs. 821.01 to 821.37.]

Section 25.15 of the City of St. Petersburg, Florida, Code (1963) provides:

"25.15 Disorderly conduct.

Any person who shall make, aid, countenance or assist in making any improper noise, disturbance or breach of the peace or diversion tending to a breach of the peace; any person found in a disorderly house, house of ill fame or gaming house; any person who shall engage in or aid or abet in any fight, quarrel or other disturbance; any person who stands, loiters or strolls about in any place in the city waiting or seeking to obtain money or other valuable thing from others by trick or fraud or who aids or assists therein; any person who shall engage in any fraudulent scheme, device or trick to obtain money or other valuable thing in any place in the city or who shall aid or abet or in any manner be concerned therein; any person

who shall window peep; or any person who shall engage in any indecent or obscene conduct in any public place shall be deemed guilty of disorderly conduct, and it shall be unlawful for any person to commit disorderly conduct. (Code 1955, ch. 25, sec. 13.)

Questions Presented

1. Whether successive municipal and state prosecutions of petitioner arising out of the same conduct violate the rule against double jeopardy and thereby violate the due process clause of the Fourteenth Amendment.

2. Whether a sentence of imprisonment and its affirmance on appeal violate the due process clause of the Fourteenth Amendment where the trial judge imposed sentence after reading a pre-sentence investigation report which he refused to make available either to petitioner or to the appellate court.

Statement of the Case

A mural on a prominent wall inside the City Hall of St. Petersburg, Florida depicted a group of Negroes (R. 116-117).* Petitioner and a number of other persons who found the mural an offensive caricature of their race, assembled outside the City Hall during business hours on

* The symbol "R." refers to the first volume of the record on appeal, prepared by the Clerk of the Circuit Court, Pinellas County, and sent to the District Court of Appeal of Florida, Second District. This volume consists of papers other than the trial transcript.

December 29, 1966. Some members of the group entered the City Hall, removed the mural from the wall and carried it through the streets of the city until they were confronted by police officers. After a scuffle the police recovered the mural which by then was in a damaged condition (Trial trans. 225-226, App. 35a-36a).*

Petitioner was charged by the City of St. Petersburg with the violation of two ordinances: destruction of city property (St. Petersburg Code (1963) sec. 25.14); and disorderly breach of the peace (sec. 25.15). The municipal court found him guilty on both charges and on January 30, 1967 he was sentenced to be jailed for ninety days on each of the two charges, the sentences to be served consecutively (R. 37, 39, 81; App. 8a-11a).

While petitioner was serving the sentence imposed by the municipal court, an information was filed charging him with the felony of grand larceny, on the basis of the same conduct as was involved in the municipal court trial (R. 81; Trial Trans. 96, 238, 421; App. 3a-4a, 15a-16a).

(Still later, three additional informations were filed on the basis of the same conduct, charging petitioner with the misdemeanors of unlawful assembly, malicious destruction of public property, and resisting arrest without violence. R. 27-35; App. 5a-7a. The three misdemeanor informations were dropped by the County Prosecuting Attorney after

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* The symbol "Trial trans." refers to the transcript of the trial in the Circuit Court. The transcript was sent by the Clerk of the Circuit Court to the District Court of Appeal, as part of the record on appeal. Since the first volume of the record on appeal consisted of papers other than the trial transcript (see previous note), the first volume of the trial transcript was entitled Volume II of the record on appeal. The original page numbering of the trial transcript was not changed.

petitioner, through his counsel, argued they violated the rule against double jeopardy. Accordingly they are not part of the present case.)

Before the grand larceny prosecution came on for trial, petitioner filed a motion in the Circuit Court where trial was to be held, seeking to quash the information on the grounds that prosecution was barred by the double jeopardy provisions of the Florida and United States Constitutions. The motion was denied (R. 80-85, App. 13a-17a). Petitioner then moved the Supreme Court of Florida, suggesting that a writ of prohibition issue to prevent the trial in view of the double jeopardy rule. The Supreme Court of Florida denied prohibition, without opinion. *State ex rel. Waller* v. *Circuit Court for the Sixth Judicial Circuit in and for Pinellas County*, 201 So. 2d 554 (Fla. 1967).

Thereafter trial was held in the Circuit Court. The jury found petitioner guilty of grand larceny (R. 127). The judge directed a pre-sentence investigation to be conducted. On July 6, 1967, having received the pre-sentence investigation report, the court pronounced sentence of imprisonment for a term of from six months to five years (the statutory maximum, Florida Statutes (1967) sec. 811.021 (2)), less the 170 days already spent in jail (R. 138). Petitioner unsuccessfully moved for discovery of the pre-sentence investigation report, both before and after sentencing (R. 139, App. 43a-45a, 46a-48a).

In preparing his appeal to the District Court of Appeal of Florida, Second District, petitioner moved the trial court to augment the record on appeal by including the pre-sentence investigation report. The motion was denied

(R—Fla. S. Ct.—item 2; App. 49a-51a).* Petitioner filed in the District Court of Appeal a certified copy of the trial court's order denying the motion to augment the record. In his appellate brief and argument before the District Court of Appeal, petitioner insisted he had a federal constitutional right to discovery of the pre-sentence investigation report.

The District Court of Appeal affirmed, with opinion, on August 28, 1968. *Waller* v. *State of Florida*, 213 So. 2d 623 (2d D.C.A., Fla. 1968) (App. 52a).

On the double jeopardy issue the District Court of Appeal stated:

> "Assuming but not holding that the violations of the municipal ordinances were included offenses of the crime of grand larceny, the appellant nevertheless has not twice been put in jeopardy, because even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court. This has been the law of this state since 1894 . . . " (App. 53a-54a).

The District Court of Appeal did not expressly rule upon the question of non-discovery of the pre-sentence investigation report. However the court evidently rejected petitioner's argument on the matter by stating, in its opinion:

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* The symbol "R—Fla. S. Ct.—" refers to the record made up by the Clerk of the Supreme Court of Florida and sent directly to this Court, following denial of certiorari by the Supreme Court of Florida. This record consists of a number of items; individual pages are not numbered.

"The appellant's other assignments of error and points on appeal have been carefully considered and found to be without merit" (App. 55a).

In affirming the denial of the motion for discovery of the pre-sentence investigation report, the court was clearly following Florida law. *Morgan* v. *State,* 142 So. 2d 308 (2d D.C.A., Fla. 1962).

In his petition for rehearing, petitioner requested the District Court of Appeal to enlarge its opinion so as to identify and expressly rule upon the federal constitutional question of the pre-sentence investigation report. Rehearing was denied without opinion on September 17, 1968. *Waller* v. *State,* 213 So. 2d 623 (2d D.C.A., Fla. 1968) (App. 56a).

On September 27, 1968 petitioner filed a timely petition for writ of certiorari in the Supreme Court of Florida, followed by a supplemental statement on jurisdiction filed on October 16, 1968 (R—Fla. S. Ct.—items 1, 2, 5). The Supreme Court of Florida denied the petition on December 4, 1968 for lack of jurisdiction. *Waller* v. *State,* 221 So. 2d 749 (Fla. 1968) (R—Fla. S. Ct.—item 1; App. 58a).

Summary of Argument

1. *The double jeopardy question*

This Court recently declared the double jeopardy provisions of the Fifth Amendment to be binding on the states through the Fourteenth. *Benton* v. *Maryland,* 395 U.S. 784 (1969).

In applying this rule, the prior municipal prosecution subjecting petitioner to imprisonment must be regarded as equivalent to a prior prosecution by the state itself.

Florida and a number of other states incorrectly hold that prior municipal prosecutions are not the equivalent of prior state prosecutions. They hold that municipalities are "sovereigns" distinct from the states, and accordingly that successive prosecutions by municipality and state are outside the scope of the double jeopardy rule.

The "separate sovereigns" theory derives some support from this Court's decisions in *Bartkus* v. *Illinois,* 359 U.S. 121 (1959) and *Abbate* v. *United States,* 359 U.S. 187 (1959) which permitted successive prosecutions by the federal and state governments (and vice versa) because each was a separate sovereign. However the relationship between municipalities and states is not analogous to that between states and the federal government. *Bartkus* and *Abbate* are therefore not analogous to the problem of successive municipal and state prosecutions. A more appropriate analogy is provided by *Grafton* v. *United States,* 206 U.S. 333 (1907) which prohibits successive prosecutions by territorial and federal authorities, since they are both arms of the same sovereign.

The municipal prosecution subjecting petitioner to imprisonment represents the attachment of jeopardy, even though for some purposes municipal prosecutions have been described as civil or petty.

The municipal prosecution should bar subsequent prosecutions by the state for higher degrees of the same offense, even though the municipal court may lack jurisdiction over those higher degrees, since the municipal court has virtually unlimited jurisdiction to impose consecutive sentences of imprisonment upon multiple-count prosecutions.

The double jeopardy rule requires that a defendant be prosecuted not more than once, on the basis of a single act or course of conduct. The state may, within the discretion of the prosecutor, join a number of prosecutions in a single trial. If the state chooses not to join all prosecutions in a single trial, it should be barred from bringing subsequent prosecutions.

The compulsory joinder of all charges into a single trial should be required, not only to bar successive trials by the state itself, but also to bar successive trials by the municipal and state governments. Liaison between municipal and state prosecutors should enable them to decide which will prosecute a single act which violates the laws of each. If necessary, the state prosecutor can exert supremacy over the municipal prosecutor, since the state is sovereign vis-à-vis the municipality.

Petitioner had a constitutionally guaranteed right to be tried no more than once for his conduct. Before his trial in the municipal court, the state and city prosecutors could have and should have conferred to determine which of them would prosecute petitioner; one single prosecution should

have ensued. Since the state permitted the municipal trial to proceed, the state was from then onwards barred from bringing a subsequent prosecution. The double jeopardy provision, in order to give meaningful protection, must require compulsory joinder of all charges against an individual defendant arising out of a single act.

As an alternative to compulsory joinder, petitioner's second trial should have been barred by applying the established Florida doctrine of lesser included offense. Under the circumstances of this case, the two municipal charges of destruction of city property and disorderly breach of the peace were lesser included offenses within the state charge of grand larceny.

Municipal offenses may be lesser included degrees of state offenses. In the present case, the District Court of Appeal of Florida assumed, without deciding, that the municipal offenses were included within the state felony of grand larceny.

2. *The pre-sentence investigation report question*

This Court has held that a sentencing judge may refer to the information contained in a pre-sentence investigation report. Petitioner's constitutionally guaranteed rights to due process and a fair trial can be respected only by giving him access to any such report used by the judge. Furthermore, a defendant's traditional right to address the court before pronouncement of sentence is illusory unless the defendant knows the contents of any report used by the court. Without access to the pre-sentence report in this case, petitioner had no opportunity to correct errors or omissions.

Recently this Court held there must be some degree of appellate review over the sentencing process, so that in certain circumstances the sentencing court must provide an explanation of the facts it took into consideration. *North Carolina* v. *Pearce,* 395 U.S. 711 (1969). Without access to the pre-sentence report in this case, petitioner had no opportunity to obtain appellate review of the trial court's exercise of its sentencing discretion.

ARGUMENT

I.

The State of Florida violated the Fourteenth Amendment to the Constitution of the United States when it prosecuted petitioner for grand larceny after he had previously been convicted in the municipal court of St. Petersburg, Florida for violation of city ordinances on the basis of the same conduct.

A. *The double jeopardy provisions of the Fifth Amendment to the Constitution of the United States are binding on the states through the Fourteenth Amendment.*

On the last day of last term, this Court held that the double jeopardy provision of the Fifth Amendment to the Constitution of the United States is incorporated into the due process clause of the Fourteenth Amendment, and is binding on the states. *Benton* v. *Maryland,* 395 U.S. 784 (1969).

B. *In applying the double jeopardy rule within the State of Florida, the prior municipal prosecution subjecting petitioner to imprisonment must be regarded as equivalent to a prior prosecution by the State of Florida itself.*

A municipality is a creature of the state, not a separate sovereign

The District Court of Appeal of Florida held that the rule against double jeopardy was inapplicable to successive prosecutions by municipal and state governments, because each is a separate sovereign (App. 54a). This ruling followed Florida law. *Theisen* v. *McDavid,* 34 Fla. 440, 16 So. 321, 26 L.R.A. 234 (1894).

The theory of the separate sovereignty of municipalities, followed in Florida at least since *Theisen* was decided in 1894, is an easy means of avoiding the difficult problems which otherwise might arise in applying the double jeopardy rule to successive prosecutions by municipal and state governments. The separate sovereignty theory was articulated as early as *Mayor & Aldermen* v. *Allaire,* 14 Ala. 400 (1848) and has been adopted not only by Florida but also by a number of other states. McQuillin, Municipal Corporations, sec. 23.10 (3d ed. 1949, Supp. 1966); Gross, Successive Prosecutions by City and State—The Question of Double Jeopardy, 43 Oregon L. Rev. 281 (1964).*

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* The separate sovereignty theory is used to exempt successive prosecutions by municipal and state governments from the double jeopardy rule in: *Pike* v. *City of Birmingham,* 36 Ala. App. 53, 53 So. 2d 394 (1951), cert. den. 255 Ala. 664, 53 So. 2d 396 (1951); *United States* v. *Farwell,* 11 Alaska 507, 76 F. Supp. 35 (D. Alaska 1948)—applying Oregon precedents to the "organized and incorporated territory" of Alaska; *State* v. *Poynter,* 220 P. 2d 386 (Idaho, 1950); *People* v. *Behymer,* 48 Ill. App. 2d 218, 198 N.E. 2d 729 (1964); *State* v. *Garcia,* 198 Iowa 744, 200 NW 201 (1924); *Earwood* v. *State,* 198 Kan. 659, 426 P. 2d 151 (1967);

The separate sovereignty theory is untenable because municipalities are not in fact sovereign; they are mere subdivisions of the state. This Court observed, in connection with legislative apportionment:

> "Political subdivisions of states—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the state to assist in carrying out state governmental functions. . . . The relationship of the states to the federal government could hardly be less analogous." *Reynolds* v. *Sims*, 377 U.S. 533, 575 (1964).

The subordinate status of the municipality vis-à-vis the state is clearly recognized in Florida law. Article VIII, Section 8 of the Florida Constitution (1885)* gives power to the State Legislature:

Louisiana ex rel. Ladd v. *Middlebrooks*, 270 F. Supp. 295 (E.D. La., 1967); *Johnson* v. *State*, 59 Miss. 543 (1882); *Ex parte Sloan*, 47 Nev. 109, 217 Pac. 233 (1923); *State* v. *Simpson*, 78 N.D. 360, 49 N.W. 2d 777 (1951); *Koch* v. *State*, 53 Ohio St. 433, 41 N.E. 689 (1895); *McCann* v. *State*, 82 Okl. Cr. 374, 170 P. 2d 562 (1946); *Miller* v. *Hansen*, 126 Ore. 297, 269 Pac. 864 (1928); *State* v. *Tucker*, 137 Wash. 162, 242 Pac. 363 (1926). *State* v. *Mills*, 108 W. Va. 31, 150 S.E. 142 (1929); *City of Milwaukee* v. *Johnson*, 192 Wis. 585, 213 N.W. 335 (1927); *State* v. *Jackson*, 75 Wyo. 13, 291 P. 2d 798 (1955). And see Note, Constitutional Law: Successive Municipal and State Prosecutions Found Permissible Despite Assumed Application of Double Jeopardy Clause (1968), Duke L. J. 362.

* The 1885 Florida Constitution, in force when petitioner was tried, has been replaced by the revised 1968 Florida Constitution, which provides increasing possibilities for local home rule, but certainly not for local "sovereignty."

"to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time."

And Article V, Section 1 of the Florida Constitution (1885, unchanged in 1968 revision) declares:

"the judicial power of the *State of Florida* is vested in a supreme court . . . and such other courts, *including municipal courts* . . . as the legislature may from time to time ordain and establish" (emphasis added).

Clearly, then, a municipality is a creature of the state, and the municipal courts exercise a portion of the judicial power of the state, as conferred upon them by the state legislature. The relationship between a municipality and the state is, therefore, not analogous to that between a state and the federal government. This case can be decided without reaching the problem of successive prosecutions by state and federal governments (and vice versa), which this Court permitted in *Bartkus* v. *Illinois,* 359 U.S. 121 (1959) and *Abbate* v. *United States,* 359 U.S. 187 (1959).

A much more apt analogy to the relationship between municipal and state governments can be found in the relationship between the government of a territory and the government of the United States. *Grafton* v. *United States,* 206 U.S. 333 (1907), clearly held that a prosecution by a territorial court is a bar to a subsequent prosecution in a court of the United States, since both are arms of the same sovereign. This rule was reiterated in *People of Puerto Rico* v. *Shell Co.,* 302 U.S. 253 (1937). It is exactly this

analogy that should control to prevent two arms of a sovereign state from punishing the same act by means of successive municipal and state prosecutions. Antieau, Municipal Corporation Law, sec. 4A.04 (1968).

The Model Penal Code supports this view. The Code defines "statute" so as to include "a local law or ordinance of a political subdivision of the state." Model Penal Code, sec. 1.13 (1962). Presumably, for purposes of applying the rule against double jeopardy under the Model Penal Code, a prior prosecution under a local ordinance will be likened to a prior prosecution under a state statute.

The municipal prosecution subjecting petitioner to imprisonment represents the attachment of jeopardy

At common law, municipal prosecutions were sometimes regarded as civil actions, because they could result only in the imposition of fines. The municipal courts could not sentence to imprisonment, even in enforcement of the fines they had themselves imposed. *Clark's Case,* 5 Co. Rep. 64a, 77 Eng. Rep. 152 (K.B. 1596); *Kirk* v. *Nowill,* 1 T.R. 118, 99 Eng. Rep. 1006 (K.B. 1786); 2 Bacon's Abridgment 149 (1856 ed.); Gross, Successive Prosecutions by City and State—The Question of Double Jeopardy, 43 Oregon L. Rev. 281, 300-304 (1964).

The closest common law analogy to the present case appears to be *R.* v. *Thomas,* 1 Sid. 179, 82 Eng. Rep. 1043; 1 Lev. 118, 83 Eng. Rep. 326; 1 Keb. 663, 83 Eng. Rep. 1172 (K.B. 1662). After the defendant had been acquitted of murder in a court in Wales he was indicted in England for the same murder. The King's Bench held that the indictment was barred by the rule against double jeopardy,

since "autrefois acquit in les Marches de Gales est bone plea ici in Angleterre." 1 Sid. 179, 82 Eng. Rep. 1043.

Today, even courts which have no power to imprison are classified as criminal, at least for some purposes. *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693 (1965); *In re Gault,* 387 U.S. 1 (1967); *City of Miami* v. *Gilbert,* 102 So. 2d 818 (3d D.C.A., Fla., 1958). *A fortiori,* the prosecution of petitioner in the municipal court, which resulted in his imprisonment for two consecutive terms of 90 days each, was a criminal proceeding which constituted jeopardy for purposes of the double jeopardy rule.

The municipal prosecution should bar subsequent state prosecutions for higher degrees of offense, even though the municipal court lacked jurisdiction over the higher degrees

The municipal court had no jurisdiction to try the charge of grand larceny. This fact should not prevent operation of the double jeopardy rule to bar a subsequent trial for grand larceny in a court of higher jurisdiction.

A number of states permit successive prosecutions by municipality and state, at least to the extent that the municipal courts lack jurisdiction over higher degrees of offense subsequently prosecuted in higher level state courts. Arkansas Stats. Ann. sec. 43-1225 (1947); *Champion* v. *State,* 110 Ark. 44, 160 S.W. 878 (1913); *People* v. *Rodriguez,* 202 Cal. App. 2d 191, 20 Cal. Rptr. 556 (1962); *State* v. *Barnette,* 158 Maine 117, 179 A. 2d 800 (1962); *Bennett* v. *State,* 229 Md. 208, 182 A. 2d 815, 4 A.L.R. 3d 862 (1962); *Commonwealth* v. *Mahoney,* 331 Mass. 510, 120 N.E. 2d 645 (1954); *State* v. *Midgett,* 214 N.C. 107, 198 S.E. 613 (1938); *Commonwealth* v. *Bergen,* 134 Pa.

Super. 62, 4 A. 2d 164 (1939); *State* v. *Butler*, 94 S.E. 2d 761 (S.C. 1956); *Mangan* v. *State*, 344 S.W. 2d 448 (Tex. Cr. 1961). See also *Diaz* v. *United States*, 223 U.S. 442 (1912); Annotation, Conviction or Acquittal of One Offense, in Court having No Jurisdiction to try Offense arising out of Same Set of Facts, Later Charged in Another Court, as Putting Accused in Jeopardy of Latter Offense, 4 A.L.R. 3d 874 (1965); Note, State v. Barnette: Two Punishments for a Single Act, 17 Maine L. Rev. 252 (1965).

But this view frustrates one of the major policies of the double jeopardy rule, that of preventing multiple trials arising out of the same act. When petitioner was prosecuted in the municipal court, admittedly that court could not find him guilty of grand larceny, because it had no jurisdiction over that felony. Therefore, in the municipal court, petitioner was not in jeopardy of being punished for grand larceny. But he was in jeopardy of being punished for the same conduct as was destined later to form the basis of the grand larceny prosecution. And, in municipal court, petitioner was subject to being sentenced to consecutive terms of 90 days' imprisonment. As it happened, he was charged with two municipal offenses, and was therefore sentenced to no more than two consecutive 90-day sentences.

The tendency of municipal courts in Florida to impose multiple-term sentences was strikingly illustrated in *James* v. *Headley*, 410 F. 2d 325 (CA 5, 1969), where two defendants in a municipal court in Florida had been liable to potential sentences of 600 days and 240 days respectively. The Court of Appeals for the Fifth Circuit held that, for purposes of determining the right to appointed counsel, the total "package" of potential punishments must be con-

sidered. And in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), this Court held that for the purpose of determining the right to jury trial, the total potential punishment must be considered. Similarly, then, for the purpose of determining the jurisdictional limits of the first court in which a defendant is tried, it is appropriate to consider the total "package" of potential punishments. This package should include not only the maximum punishment for the offenses charged, but also the maximum for any other offense which could have been charged; see discussion of compulsory joinder, *infra*.

C. The double jeopardy rule required that petitioner be tried not more than once on the basis of a single act or course of conduct, even though he may simultaneously have violated municipal ordinances and state statutes. This conclusion is compelled, either by applying a requirement of compulsory joinder, or alternatively by applying the law on lesser included offenses.

The double jeopardy rule prevents multiple punishments for the same act

The double jeopardy rule has been applied in widely varying types of situation. Understandably it has been interpreted flexibly, and not always consistently. Sometimes the issue arises when a defendant objects to multiple charges being prosecuted in a single trial, based either on a series of similar acts, *Yates* v. *United States*, 355 U.S. 66 (1957), or on a single act which simultaneously violates a number of statutes, *Gore* v. *United States*, 357 U.S. 386 (1958). At other times the double jeopardy arises in the context of multiple trials, based either on a series of similar acts carried out in execution of a single scheme, *United States* v. *Adams*, 281 U.S. 202 (1930), or on a single course

of conduct involving multiple victims, *Hoag* v. *New Jersey*, 356 U.S. 464 (1958), *Ashe* v. *Swenson*, No. 57, October Term, 1969 (scheduled for argument immediately before the present case), or on a series of acts where one was "an incident and a part of" another, *In re Nielsen*, 131 U.S. 176 (1889). Varying interpretations of the double jeopardy rule are analyzed in Sigler, Double Jeopardy 63-69, 100-109 (1969); Note, Twice in Jeopardy, 75 Yale L. J. 262 (1965); Annotation, Modern Status of Doctrine of Res Judicata in Criminal Cases, 9 A.L.R. 3d 203 (1966).

The basic thrust of the double jeopardy rule is that there shall not be multiple punishments for the same act. *Ball* v. *United States*, 349 U.S. 81 (1955), *Prince* v. *United States*, 352 U.S. 322 (1937), *Heflin* v. *United States*, 358 U.S. 415 (1959). A collateral principle is that if multiple punishments are called for, they should be imposed at a single trial, under a requirement of compulsory joinder.

The compulsory joinder doctrine requires that, in situations where multiple punishments are called for, they should be imposed at a single trial

It was a clear policy of the common law that multiple trials to prosecute the same defendant for the same act should be prevented. This policy was carried out, not only by the pleas of *autrefois acquit* and *autrefois convict*, but also by the unwillingness of the courts to have their process abused by repetitious prosecutions based on the same act, even in situations where the *autrefois* pleas could not be used. *Connelly* v. *Director of Public Prosecutions*, (1964) 2 All E.R. 401 (H.L.), opinion of Pearce, L.J. at 447-448; *Regina* v. *Elrington*, 9 Cox Crim. Cas. 86, 90; 1 B & S 688, 121 Eng. Rep. 870 (Q.B. 1861); *Regina* v.

Walker, 2 Moo. & Rob. 446, 174 Eng. Rep. 345 (York Assizes, 1843); *Regina* v. *Stanton,* 5 Cox Crim. Cas. 324 (Worcester Assizes, 1851). Thus the common law of double jeopardy consists not only of the *autrefois* pleas, but also of the policy of compulsory joinder. Compulsory joinder is a rule of constitutional dimension, since it must be considered to be part of the meaning implicit in the Fifth Amendment rule against double jeopardy.

The Model Penal Code provision on compulsory joinder states:

> Sec. 1.07
>
> "(2) *Limitation on Separate Trials for Multiple Offenses.* Except as provided in Subsection (3) of this Section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.
>
> (3) *Authority of the Court to Order Separate Trials.* When a defendant is charged with two or more offenses based on the same conduct or arising from the same criminal episode, the Court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires."

"Conduct" is defined in the Code, sec. 1.13(5) as "an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions."

A similar compulsory joinder rule has been enacted in Illinois. Ill. Stat. Ann. ch. 38, sec. 3-3, with Committee Comments (Smith-Hurd, 1961).

By limiting compulsory joinder to offenses within the jurisdiction of a single court, the Model Penal Code drains compulsory joinder of much of its potency. Even a trial in a court of petty jurisdiction is a trial, within the contemplation of the basic policy that multiple trials should be avoided. And furthermore, while the municipal court of St. Petersburg may appear to have a jurisdictional limit of 90 days' imprisonment, in fact the court may expand this jurisdiction whenever it is faced with a multiple-count charge, by imposing consecutive sentences. Under these circumstances it may be difficult to state what precisely is the jurisdictional limit of the municipal court.

Compulsory joinder should be required, as an element of the double jeopardy provision of the Fifth Amendment, without regard to whether or not all the offenses fall within the jurisdiction of a single court. Later portions of this argument will suggest how this can be carried out within the framework of effective law enforcement.

The view of compulsory joinder urged here is supported by the American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures, sec. 5.2(b) (Tentative Draft, 1967), which provides that after conviction but before sentencing, a defendant should be permitted to plead guilty to other offenses within the jurisdiction of the sentencing court, or any other court of coordinate *or inferior* jurisdiction. And see Dession, Final Draft of the Code of Correction for Puerto Rico, 71 Yale L. J. 1050,

1114-1115, n. 68 (1962); Annotation, Court's Right, in Imposing Sentence, to Hear Evidence of, or to Consider, Other Offenses Committed by Defendant, 96 A.L.R. 2d 768 (1964); *Maynes* v. *People,* 454 P.2d 797 (Colo. 1969)—on related matter of merger of two sentences arising out of a single transaction.

The compulsory joinder doctrine requires a single trial, even of a defendant who allegedly has violated both municipal and state laws

The City of St. Petersburg Code contains a provision (sec. 25.69, Code of 1963) that every state misdemeanor committed within the city is also, automatically, a municipal offense. Petitioner was not prosecuted under this ordinance; the grand larceny charge in the Circuit Court was, in any event, a felony, and therefore outside the scope of this ordinance. It is cited here to indicate the City's policy in favor of concurrent jurisdiction of the city and the state over all misdemeanors. Such ordinances are valid under Florida law. *Orr* v. *Quigg,* 135 Fla. 653, 185 So. 726 (1938); *State ex rel. Springer* v. *Smith,* 189 So. 2d 846 (4th D.C.A., Fla., 1966).

No statistics are available on dual prosecutions by municipalities and the State of Florida.* To the best of counsel's knowledge and belief, very few persons in Florida are subjected to dual prosecutions. Evidently prosecutors find a "need" for dual prosecution only when they especially want either to hold the defendant, or to explore his de-

* Over two years ago, during the early stages of this case, counsel for petitioner requested such statistics from the Attorney General of Florida, who replied they were unavailable.

fense, or to bargain for the plea, or to "throw the book" at a particularly unpopular defendant.

In some states the municipality is not allowed to enact ordinances in areas covered by state penal statutes; the state is considered to have pre-empted the field. These states evidently do not experience the "need" for dual prosecution. (The problems of lesser included offenses and compulsory joinder may of course arise in these jurisdictions; see discussion *infra.*) *People* v. *Orozco,* 72 Cal. Rptr. 452 (1968); Conn. Gen. Stats. Ann. sec. 7-154 (1958); Ga. Const. (1945) Code Ann. Sec. 2-402; *Jenkins* v. *Jones,* 209 Ga. 758, 75 S.E. 2d 815 (1953); Indiana Ann. Stat. sec. 9-2402 (1956); *Mitsch* v. *City of Hammond,* 234 Ind. 285, 125 N.E. 2d 21 (1955); R.I. Gen. Laws sec. 45-6-6 (1956).

Some other states allow concurrent municipal/state penal laws, but prohibit dual prosecutions. Hawaii Rev. Stats. secs. 706-2, 706-3 (1968); *Territory* v. *Silva,* 27 Hawaii 270 (1923); *People* v. *Sherman,* 45 Misc. 2d 92, 256 N.Y.S. 2d 144 (S.Ct., App. Term, 2d Dept. 1964); Va. Code Ann. sec. 19.1-259 (1950). A similar result is reached by Ky. Const. sec. 168 (1961); *City of Newport* v. *Nier,* 239 S.W. 2d 491 (Ky. App., 1951); *Burnett* v. *Commonwealth,* 284 S.W. 2d 654 (Ky. 1955). Colorado and Minnesota require state criminal procedure to be followed in prosecutions of municipal offenses which are also state offenses; a prohibition against dual prosecution may be inferred. *City of Canon City* v. *Meris,* 323 P. 2d 614 (Colo. 1958); *City of Bloomington* v. *Kossow,* 131 N.W. 2d 206 (Minn. 1964).

The variations amongst the laws of the several states suggest there is no compelling reason for providing dual

prosecutions by city and state. In the absence of such a reason, the plain language of the double jeopardy clause clearly prevents dual prosecutions.

Liaison between prosecutors can result in effective law enforcement in compliance with the double jeopardy rule

Compliance with the double jeopardy rule is, primarily, the responsibility of prosecutors. While courts have been reluctant to interfere with the exercise of prosecutorial discretion, *Newman* v. *United States,* 127 U.S. App. D.C. 263, 382 F. 2d 479 (1967), they have intervened in instances of clear abuse. *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967).

There have been some attempts to establish liaison between federal and state prosecutors, so as to avoid multiple prosecutions of persons who have committed offenses against the federal government and a state. *Petite v. United States,* 361 U.S. 529 (1960); Sigler, Double Jeopardy 177-180 (1969); Miller, Double Jeopardy and the Federal System 117-121 (1968); Va. Code Ann. sec. 19.1-259 (1950).

Liaison should be considerably easier to establish between state and municipal prosecutors, due to the unquestioned supremacy of the state vis-à-vis the municipality. As the Supreme Court of New Jersey noted in *State* v. *Mark,* 23 N.J. 162, 128 A. 2d 487 (1957):

> "(E)ffective orderly procedure dictates the necessity for a working agreement between municipal authorities and the county prosecutor whereby the more serious crimes are tried in the court in which it was intended they should be disposed of, rather than in the mu-

nicipal police court under the charge of disorderly conduct." 128 A. 2d at 490 (dictum).

See also *State* v. *Labato,* 7 N.J. 137, 80 A. 2d 617 (1951).

Liaison between municipal and state prosecutors should enable them to decide which will prosecute a single act which violates the laws of each. If a defendant has been arrested by one, and it is later decided he should be prosecuted by the other, the case should be removed to the appropriate court. In case of abuse of the process of holding and transfer, defendants have available remedies of habeas corpus and false arrest. In the event of a dispute between municipal and state prosecutors, the state evidently has paramount authority; if necessary, the state prosecutor should be able to *nolle prosequi* the municipal charge, cf., *United States* v. *Shaw,* 226 A. 2d 366 (D.C. App., 1967), or alternatively to seek a writ of prohibition to prevent the trial from taking place in the municipal court.

We do not suggest these liaison possibilities are constitutional requirements. The constitutional requirement at issue is the rule against double jeopardy. The liaison possibilities are explored here only for the purpose of suggesting that effective law enforcement can be carried out at the same time as the double jeopardy rule is respected.

Historical instances of multiple trials by municipal and state authorities may have been justified at the time, because the state may not have had a reasonable opportunity to intervene before the municipality tried the defendant. However, with the availability of modern communications, and with such organizations as the Florida Bureau of Law Enforcement (recently established pursuant to Florida Statutes (1967) Sec. 23.086 (8), (11)), it is difficult to

imagine a situation where the state would lack a reasonable opportunity to prosecute before a municipal trial.

Petitioner had a constitutionally protected right to compulsory joinder of the municipal and state charges

Throughout the proceedings in this case it has been undisputed that the municipal prosecution for destruction of city property and disorderly breach of the peace was based upon the same act or course of conduct as the state prosecution for grand larceny.

Petitioner was entitled to have all charges "packaged" into a single trial, which should bar any subsequent trial in any court. It was the responsibility of the prosecutors to decide which of them would prosecute petitioner, and in which court. If they had decided to proceed only in the Circuit Court, they would have been obliged to drop the charges for violation of city ordinances, over which the Circuit Court has no jurisdiction. This result is fully compatible with the letter and the spirit of the double jeopardy clause; the effect is to merge the relatively petty municipal offense into the relatively serious state offense.

The Circuit Court could have imposed (and in fact did impose) a sentence of five years' imprisonment for the felony of grand larceny. This was an extremely severe penalty for the conduct of the petitioner. It can hardly be contended that the interests of law and order required the petitioner to be sentenced for the additional 180 days by the municipal court.*

* The three misdemeanor charges originally brought against petitioner on the basis of the same conduct would have necessitated trial in a third court, the Criminal Court of Record, and carried a potential punishment of a total of two more years' imprisonment. The three misdemeanor charges were dropped before going to trial.

As an alternative to compulsory joinder, petitioner had a constitutionally protected right to have the Circuit Court trial barred, under the lesser included offense doctrine

Jurisdictions which recognize prior municipal prosecutions as the equivalent, for double jeopardy purposes, of prior state prosecutions apply the general doctrine of lesser included offense, so as to determine whether a specific municipal prosecution barred a specific state prosecution. *Gavieres* v. *United States,* 220 U.S. 338 (1911); *Randolph* v. *District of Columbia,* 156 A. 2d 686 (D.C. Mun. App., 1959); *Taylor* v. *Curry,* 215 Ga. 734, 113 S.E. 2d 398 (1960); *State* v. *Labato,* 7 N.J. 137, 80 A. 2d 617 (1951). This rule should be incorporated in the double jeopardy prohibition as applied to the States.

The established Florida doctrine of lesser included offense, developed in connection with successive trials in state courts, is stated in *Sanford* v. *State,* 75 Fla. 393, 396, 78 So. 340, 341 (1918):

> "If the first information is such that the accused might have been convicted under it on proof of the facts by which the second information is sought to be sustained, then the jeopardy which attached on the first must constitute a protection against trial on the second."

The rule was reiterated in *Wilcox* v. *State,* 183 So. 2d 555, 557 (3d D.C.A., Fla., 1966).

The *Sanford* rule bars the state from re-prosecuting for successively higher offenses arising out of the same transaction. Note, Lesser Included Offenses in Florida, 16 U. Fla. L. Rev. 341, 352 (1963).

The information for grand larceny filed by the State Attorney on January 18, 1967 (App. 4a) is in the following terms:

> "one painting, of a value in excess of $100.00, lawful money of the United States of America, a more particular description of which painting is to the State Attorney unknown, of the goods, chattels and property of the City of St. Petersburg, Florida, a municipal corporation, then and there being found, did feloniously steal, take and carry away . . ."

These same allegations, if proved, could form the basis of a conviction under sec. 25.14 of the St. Petersburg Code (1963) which provides, in material part (App. 12a):

> "It shall be unlawful for any person maliciously or wilfully to destroy, mutilate, injure or deface any of the public buildings . . . or other property of the city. . . ."

There is no record of the testimony introduced at the municipal court trial. Petitioner was present in person, and subsequently executed an affidavit that to the best of his knowledge and belief, the prosecution instituted in the Circuit Court was based on the identical conduct as had been at issue in the municipal court (App. 15a-16a).

The *Sanford* rule bars the State from re-prosecuting, after the city prosecution of a lesser-included offense. Moreover, the District Court of Appeal, in affirming the judgment and sentence of the Circuit Court, assumed, without deciding, that the municipal offenses were included within the state felony of grand larceny.

II.

The State of Florida violated the Fourteenth Amendment to the Constitution of the United States when the trial court pronounced sentence upon petitioner on the basis of a pre-sentence investigation report to which petitioner was denied access; a similar violation occurred when the District Court of Appeal of Florida affirmed the sentence after the trial court had denied petitioner's request to have the report included in the record on appeal.

A. *In denying petitioner's request for discovery of the report before sentencing, the trial court violated petitioner's rights to fair trial, confrontation of witnesses and assistance of counsel.*

This Court has held that a sentencing judge may refer to the information contained in a pre-sentence investigation report. *Williams* v. *New York,* 337 U.S. 241 (1949); *Williams* v. *Oklahoma,* 358 U.S. 576 (1959). Some of this Court's opinions strongly suggest that a defendant has a constitutionally protected right to examine and rebut the report. *Specht* v. *Patterson,* 386 U.S. 605 (1967); *Kent* v. *United States,* 383 U.S. 541 (1966); *Townsend* v. *Burke,* 334 U.S. 736 (1948). However this Court has not ruled directly on the point.

It is fundamental that a party appearing before a court or other tribunal is entitled to know what evidence is being used. *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U.S. 292 (1937); *Pointer* v. *Texas,* 380 U.S. 400 (1965); *Douglas* v. *California,* 380 U.S. 415 (1965). Furthermore, petitioner had a fundamental right to address

the trial court before pronouncement of sentence. *Anonymous,* 3 Mod. 265, 87 Eng. Rep. 175 (K.B. 1689); *Green* v. *United States,* 365 U.S. 301 (1961); *State* v. *Laird,* 85 N.J. Super. 170, 204 A. 2d 220 (1964). This right was illusory indeed since petitioner did not know what information was before the court in the pre-sentence investigation report.

Without access to the report, petitioner had no opportunity to correct errors or omissions. The severity with which petitioner was treated by the trial court, both at the time of sentencing and in later proceedings concerning release on bond pending appeal, suggests that the pre-sentence investigation report may well contain scandalous matter prejudicial to petitioner.*

Some states recognize a defendant's right to discovery of the contents, but not necessarily identification of the sources of information, of any pre-sentence investigation report used by the court. Alabama Code, title 42, sec. 23 (1958); *Poole* v. *State,* 44 Ala. App. 169, 204 So. 2d 564 (1967); Calif. Penal Code, sec. 1203, 1203.01 (1969 Supp.);

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* First, the trial court imposed the maximum sentence for grand larceny, in a situation where the grand larceny charge was somewhat far-fetched. Second, he refused to release petitioner on bond pending appeal, and was reversed by the District Court of Appeal, Second District, reported as *Waller* v. *State,* 208 So. 2d 147 (2d D.C.A., Fla., 1968). Third, he again denied release on bond after the ruling by the District Court of Appeal, and was reversed by the Supreme Court of Florida (App. 57a). As reported in the St. Petersburg Times, November 20, 1968, p. 6B: "(Judge) Phillips denied Waller access to bail Oct. 5, labeling the action 'a benefit to society.' The State Supreme Court on Nov. 12 reversed Phillips and ordered him to reinstate Waller's $2,500 bond. . . ." The proceedings in the Supreme Court of Florida concerning petitioner's release on bond pending appeal appear *in extenso* in the record of this case (R. Fla. S. Ct.—items 3, 4, 6, 7 and 8).

State v. *Gullette*, 3 Conn. Cir. 153, 209 A. 2d 529 (1964); *State* v. *Rolfe*, 92 Idaho 467, 444 P. 2d 428 (1968); *Green* v. *State*, 247 A. 2d 117 (Maine, 1968); Mass. Ann. Laws, ch. 279, sec. 4A (as amended, 1968); cf. *Commonwealth* v. *Martin*, 244 N.E. 2d 303 (Mass. 1969); Minn. Crim. Code, sec. 609.115(4) (1963); *Kuhl* v. *District Court*, 139 Mont. 536, 366 P. 2d 347 (1961); *State* v. *Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962)—cf. N. C. Gen. Stats., sec. 15-207 (1965); *State* v. *Willms*, 117 N.W. 2d 84 (N.D. 1962)—subject to special qualifications; Ohio Rev. Code, sec. 2947.06 (1968 Supp.); *State* v. *Vance*, 117 Ohio App. 169, 191 N.E. 2d 737 (1962)—cf. Ohio Rev. Code, sec. 2951.03 (1968 Supp.); *State* v. *Simms*, 131 S.C. 422, 127 S.E. 840 (1925); Va. Code Ann., sec. 53-278.1 (1967); *Linton* v. *Commonwealth*, 192 Va. 437, 65 S.E. 2d 534 (1951); Utah Code Ann., secs. 77-35-12, 13 (1953).

At the opposite extreme, Florida requires the court to keep the report confidential. *Morgan* v. *State*, 142 So. 2d 308 (2d D.C.A., Fla., 1962). Delaware has a similar rule, subject to relaxation in special circumstances. *State* v. *Moore*, 108 A. 2d 675 (Del. Super. 1954).

Still other states take an intermediate position, leaving the trial court with full discretion either to disclose or not to disclose the report. *State* v. *Scanlon*, 104 Ariz. 187, 450 P. 2d 377 (1969); *State* v. *Delano*, 161 N.W. 2d 66 (Iowa, 1968); Maryland Rules Proc., rule 761d (1957); *Costello* v. *State*, 237 Md. 464, 206 A. 2d 812 (1965); *People* v. *Camak*, 5 Mich. App. 655, 147 N.W. 2d 746 (1967); *People* v. *Peace*, 18 N.Y. 2d 230, 273 N.Y.S. 2d 64, 219 N.E. 2d 419 (1966), cert. den. 385 U.S. 1032; *In re Baldwin*, 126 Vt. 442, 234 A. 2d 434 (1967); *Waddell* v. *State*, 24 Wis. 2d 364, 129 N.W. 2d 201 (1964).

Before adoption of the 1966 Amendments to the Federal Rules of Criminal Procedure, there was conflict amongst the federal courts of appeal. The defendant's right to discovery of the pre-sentence investigation report was recognized by *Stephan* v. *United States*, 133 F. 2d 87 (CA 6, 1943), *cert. den.* 318 U.S. 78, and by *Smith* v. *United States*, 223 F. 2d 750 (CA 5, 1955). Other circuits left the matter within the discretion of the trial court. *Powers* v. *United States*, 325 F. 2d 666 (CA 1, 1963); *Friedman* v. *United States*, 200 F. 2d 690 (CA 8, 1952).

Adoption of Rule 32(c)(2), providing that federal courts may disclose all or part of the pre-sentence investigation report to defendant or his counsel, has led to a uniform practice amongst the circuits, all holding that the trial court has full discretion either to disclose or not to disclose. *United States* v. *Fischer*, 381 F. 2d 509 (CA 2, 1967); *United States* v. *Weiner*, 376 F. 2d 42 (CA 3, 1967); *Baker* v. *United States*, 388 F. 2d 931 (CA 4, 1968); *Roeth* v. *United States*, 380 F. 2d 755 (CA 5, 1967); *United States* v. *Trigg*, 392 F. 2d 860 (CA 7, 1968), cert. den. 391 U.S. 961; *Cook* v. *Willingham*, 400 F. 2d 885 (CA 10, 1968).

Disclosure of the pre-sentence investigation report to the defendant or his counsel has been recommended by the Model Penal Code, sec. 7.07 (1962); American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures, sec. 4.4 (Tentative Draft, 1967); American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences, sec. 2.3 (Tentative Draft, 1967); Model Sentencing Act, sec. 4 (1963); Amendments to Federal

Rules of Criminal Procedure, Dissenting Statement by Douglas, J., 383 U.S. 1089, 1092-1093 (1966); and numerous legal scholars. See Bach, The Defendant's Right of Access to Presentence Reports, 4 Crim. L. Bull. 160 (1968).

Florida's rule of secrecy is so far out of the mainstream of practice and theory in the United States, one must conclude that it violates constitutionally protected rights.

B. *In affirming the sentence without requiring inclusion of the report in the record on appeal, the District Court of Appeal of Florida failed to provide adequate review and thereby denied petitioner's right to due process.*

In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969) this Court held that a trial judge imposing a more severe sentence upon a second trial than at the first must express the factual basis of the increased sentence. One obvious purpose of this rule is to enable the appropriate appellate court to review the trial court's exercise of sentencing discretion, at least in this special type of situation.

Pearce therefore stands as a rule, not only addressed to the trial court requiring an explanation of the sentence, but also expressed to the appellate court requiring an evaluation of the sentence in the light of the explanation given. An appellate court that fails to meet its obligation under this rule commits its own violation of the due process rights of the defendant.

Pearce exemplifies the increasing recognition that a defendant needs as much protection during the sentencing process as during earlier parts of his trial. This protection is of little value unless the sentencing discretion of

the trial court can be subjected to meaningful appellate review. American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences (Tentative Draft, 1967); Mueller, Penology on Appeal: Appellate Review of Legal but Excessive Sentences, 15 Vand. L. Rev. 671 (1962); Appellate Review of Sentences: Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit, 32 F.R.D. 249 (1962). Without access to the pre-sentence report in this case, petitioner had no opportunity to obtain appellate review of the trial court's exercise of its sentencing discretion.

CONCLUSION

For the reasons stated above, this Court should quash the information for grand larceny, vacate the judgment and sentence rendered below by the Circuit Court, and order petitioner discharged.

Respectfully submitted,

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September 1, 1969

Counsel gratefully acknowledge the research assistance provided in this case by the following law students at the University of Florida: Messrs. Jeffrey H. Barker, James G. Darragh, C. McFerrin Smith III, Michael P. Smodish and Donald E. Wilkes, Jr.